IN DEFENCE OF VICTORIA'S CHILDREN'S COURT

Its value and role in the child protection system

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Australian child protection systems have been subject to sustained and significant criticism for many decades. As a central part of that system Children's Courts have been implicated: three recent inquiries into the child protection system in Victoria all criticised the Family Division of the Children's Court.[1] In the resulting debate two diametrically opposed points of view surfaced about the Children's Court and the role that legal procedures and professionals should play in child protection matters. On one side bodies like the Children's Court of Victoria, Victoria Legal Aid ('VLA'), the Law Institute of Victoria ('LIV'), and the Federation of Community Legal Centres ('FCLC') argued that the Children's Court plays a vital role in child protection and should continue to play that role.[2] On the other side a coalition of human service and child protection agencies called for major change including the removal of the Children's Court from the child protection system. Victoria's Department of Human Services ('DHS') has been critical of the Court[3] as have community sector organisations like Anglicare, Berry Street, MacKillop Family Services and the Salvation Army — all agencies the DHS funds to deliver child protection services.[4] Victoria's Child Safety Commissioner has also called for major reform, publicly labelling the Court a 'lawyers' playground' and recommending abolishing the Court's involvement in child protection completely.[5]

That debate has, for the time being, been resolved. The *Protecting Victoria's Vulnerable Children Inquiry Report* ('the Cummins Report') tabled in the Victorian Parliament in February 2012 produced a number of findings and recommendations that dealt specifically with the question of whether the Children's Court should continue to play a role in Victoria's child protection system.[6] The Cummins Report devoted a chapter to the question of the Children's Court and recommended that it should continue to have the primary role in determining the lawfulness of proposed intervention by the state. Among its 90 recommendations it argued for less adversarial court processes as well as a range of collaborative problem-solving approaches. This was followed in May 2012 by a Directions Paper (*Victoria's Vulnerable Children: Our shared responsibility)* which summarised the initial response by the government to the Cummins Report with a focus on making access to the Children's Court easier and less adversarial and formal.[7]

If we step back from the immediate policy-making process, it is apparent that among the elements driving this debate are persistent tensions and a clash of cultures between agencies, especially between DHS and the Children's Court.[8] The relationship between the Department and the Children's Court has been characterised by serious conflict, with relations between DHS staff and the Children's Court best described as lacking in basic trust and good will, at worst as deeply antagonistic. Reports by the Victorian Ombudsman suggest, among other things, that the Department of Human Services is, like many contemporary government agencies, characterised by untrammeled executive and managerial power the leadership of which is an enthusiastic proponent of New Public Management ('NPM'). The leadership of the Department is characteristic of a 'command culture' contemptuous of the consultative practices — inclusive, for example, of 'on-the-ground' child protection workers and middle managers. It is a culture that privileges obedience over the professional judgment or ethical stance of child protection workers. Official reports by the Victorian Ombudsman confirm that protective workers (and others) have been required to act in ways they find seriously compromising, leading to unacceptably high staff turnover, ill-health and low morale.

The Children's Court has a different organisational work culture. Unlike the DHS, staff in the legal system and the Children's Court operates with a legal-rational decision-making style, respectful of a variety of forms of legal rationality, reliant on clearly set rules, principled argument and a regard for evidence. Staff enjoys a high level of professional autonomy, the opportunity to exercise power, collegial and more collective decision-making processes, and good wages and conditions.

Explaining the different positions on the role of the Children's Court by recourse to these kinds of sociological accounts is one option, but one which we do not develop further here. Rather our focus is on the ethical and normative dimensions of the controversy, centreing especially on the way the role of legal principles are understood and valued. This dimension is suggested, albeit obliquely. As an example, in one submission to the 2011 *Protecting Victoria's Vulnerable Children Inquiry,* a coalition of agencies critical of the Victorian Law Reform Commission's review of child protection legislation argued that the 'review suffers from the vice of being a review of the law by lawyers'.[9] At stake are the design principles which the community and its political representatives might use when evaluating the various social, legal and moral issues invoked when the state decides to intervene to 'protect' children and young people in families suspected of not caring for their children and young people adequately. Central to the debate about reducing or removing the Children's Court's current role in complex child protection matters are different ideas about the relative value of continuing to rely on a range of legal principles and procedure. That is why claims made by these advocates for major reform are worthy of investigation and deserve scrutiny.

While there is an empirical question about the credibility of claims about the failures of the current system, the issues of principle are the ones we focus on here. We begin by addressing the empirical case for change before turning to the kind of practical reasoning that may assist with deciding whether or not the role of the Court and lawyers should be amended in ways that have been proposed.

This article will be of interest to those concerned about child protection legislative arrangements and how to promote the best in-

terests of vulnerable children and their families who find themselves at risk of mandated intervention into their lives.

Criticisms of the Children's Court

In 2009, following an investigation into Victoria's child protection system the Victorian Ombudsman argued 'the appropriateness of a legal system involving such a contested approach ought to be reconsidered'.[10] The Ombudsman made this observation on a number of grounds, pointing to the 'substantial resources being absorbed by the legal process … negative experiences of the legal system by the child protection program workforce [and] the [negative] impact of a highly contested system' on children and families.[11]

The Ombudsman's Review presented at least three major criticisms of the Children's Court and the juridical basis of Victoria's child protection system. There was the claim, first, that the Children's Court was resource-intensive and consumed too much of the scarce time available to overworked child protection workers. Second, DHS and child protection workers pointed to negative experiences in the Court, claiming that the Children's Court was 'disrespectful' of child protection workers and too often was a 'brutalising experience' that affected staff morale and retention.[12] Child protection workers also expressed concern about the onerous nature of court-based evidentiary procedures used to test claims made in support of their case for intervention. Finally it has been alleged that the Children's Court is excessively adversarial. Paul McDonald, CEO of Anglicare Victoria, characterised proceedings in the Children's Court as 'unhelpful legal slugfests'.[13] Anglicare, Berry Street, MacKillop Family Services, the Salvation Army, Victorian Aboriginal Child Care Agency and Centre for Excellence all raised concerns about the adverse impact of court hearings on already vulnerable and often traumatised children as well as family relationships.[14]

As we have said there are important ethical issues at stake here. However before we canvas those issues, we make one basic empirical observation which suggests that these criticisms are not well founded.

Relevant empirical considerations

The force of each of these criticisms is blunted by one basic factual consideration: the number of cases contested and which proceed to a final contested hearing in the Children's Court is simply too small to support the criticisms. To claim that the role played by the Children's Court is variously time-consuming, stressful for child protection workers, or excessively adversarial with negative consequences for children, would be a concern, were it not for the fact that fewer than three in a hundred cases are ever contested.

The Children's Court of Victoria reported that in 2007–08 there were 41 607 child protection reports.[15] Of these, DHS investigated 11 217 reports and substantiated 6365. The Department then initiated 3336 protection applications out of the 6365 cases it regarded substantiated. In terms of what then happened, the Children's Court endorsed the overwhelming majority of requests for an order. Few cases required a contested hearing and 'the great bulk of cases were resolved by negotiation'. Indeed the Children's Court reported that only 1 per cent of primary applications by notice, 3 percent of primary applications by safe notice, and 1 per cent of secondary applications, proceeded as contested hearings.[16] As the Chief Judge of the Children's Court noted:

> It has been asserted by the Ombudsman that the court is too adversarial … The truth is, only a tiny percentage of cases proceed as a final contest. It is true that cases that go on can be heavily contested. This is because all prospects for mediated solutions have been exhausted and there is usually a legitimate area of dispute.[17]

VLA, in its submission, likewise confirmed that 97 per cent of primary protection applications filed at the Children's Court did not go to a final contested hearing because the parties had settled either through a formal alternate dispute resolution process or simply by the negotiation of the parties at court mention dates.[18] The Office for the Child Safety Commissioner, which has been very critical of the Children's Court, also conceded this point agreeing that 'only a relatively small percentage of reports to child protection result in contested proceedings in the Children's Court'.

In short, criticisms about the alleged waste of time, allegations about the negative experiences of child protection workers and the effects of an adversarial system appear to be a considerable over-reaction.

Notwithstanding the small number of cases that go to a contested hearing, and moves underway in 2012 to reform aspects of the functioning of the Children's Court, it is still important to ask if a contest in these circumstances is either appropriate or desirable. We argue this matter goes some way to addressing the question of what good is served by the involvement by the Children's Court in child protection. This, in turn, points to the need for some clarity about the nature of the practical (and ethical) issues that need to be explored.

Identifying the relevant practical considerations

It has been argued by all antagonists in this debate that the only question which matters is whether the 'best interests' of vulnerable children are being promoted or not. This reference point is used by those wanting to do away with the Children's Court and lawyers as well as by those who want to preserve the Court's role. We say that relying on moral assertions based on claims about what is deemed to be in the 'best interests' of children is not useful in determining a specific position about the value of the Children's Court. Nor does it help particularly to follow Rebecca Boreham, former convenor of the FCLC Child Protection Working Group, when she observed that 'the best interests of the child [involves] a balance between strong measures to protect safety, and the requirement to use the least intrusive and disruptive means possible to ensure protection'.[19]

It is not surprising that all players in this debate lay claim to be driven by promoting the 'best interests' of children.[20] For one thing the relevant legislation mandates taking such a position. Indeed *The Children, Youth and Families Act 2005* (ss 8, 10) establishes that some 23 principles are to be taken into account when determining what the 'best interests' of the child are when decisions are made or action taken by the Children's Court, the DHS and community service organisations. If we acknowledge Alasdair MacIntyre's description of contemporary moral arguments as 'interminable', the reliance by all parties in the debate on the 'best interests' principle is unsurprising. Following MacIntyre, it is not surprising to discover that a mish-mash of premises which employ different normative and evaluative concepts, inform the 'best interests' principle and the additional 23 considerations. For example the legislation invokes the idea of protecting children's rights (s 10.2) as well as universalisability, which are themselves at odds but are also incommensurable with principle s 10.3(a) that invokes liberty. In other words, when either side draws on the 'best interests principles', 'the rival premises are such that we possess no rational way of weighing the claims of one as against the other.'[21]

Should we therefore avoid invoking relevant practical criteria to assess whether or not to keep the Children's Court? We argue that one thing is needed: clarity about the practical or ethical intention, purpose and reason for action. This means working out what the child protection system and the different components of it such as the Children's Court *ought* to be doing, in a way that does not rely on incompatible considerations which inform the 'best interest of the child' principle.

We suggest there are several relevant considerations which warrant preserving the current role of the Children's Court.

Reasons for preserving the role of the Children's Court

A number of commentators have indicated why Victoria needs a Children's Court and legal representation for those who become involved in child protection matters to provide a check on abuses of sovereign power. The Honourable Murray Gleeson makes this clear for us when stressing the point that the law both restrains and civilises power and invokes the principle that 'we are ruled by laws and not by people means that all personal and institutional power is limited.'[22]

Boreham drew on the Victorian Ombudsman's review of the role of the DHS when she described important procedural failures:

> The Ombudsman's report recognises that the capacity of the Department to comprehensively investigate the situation of children reported to them is severely limited, a finding accepted and raised by child protection workers themselves. The Ombudsman goes further to say that the critical response by the Department to children in need of care is often inappropriate, and that case-planning for children in the care of the Department is often inadequate and poorly executed.[23]

Children's Court lawyer Joe Gorman too has reminded us that prior to the Carney Review, the DHS had 'untrammeled power' that resulted in 'many more children … being routinely placed in state care for indefinite periods'.[24] Social researcher Briony Horsfall pointed to problems entailed when DHS relied increasingly on taking children into safe custody.[25] The FCLC argued, 'the Department of Human Services does not demonstrate a commitment to involving families in decision-making and empowering parents to be involved.' [26] VLA was also critical of the DHS practice on voluntary agreements.[27] Managing Director Bevan Warner argued that the DHS does not do all it can to ensure that formal legal proceedings 'get off to a good start' and that the Department of Human Services has 'the heaviest onus' for this to take place.[28]

According to Gorman while the great majority of cases before the Children's Court are resolved by negotiation, a small number of cases are not amenable to negotiation.[29] It is essential given the gravity of what is at stake, that these cases are resolved only 'after all relevant evidence is considered and tested'. In a similar vein Boreham argued that, 'In a civilized society there is an expectation that allegations should be proved'. She added:

> Important decision with such huge consequences as … taking children from their families, stopping or limiting contact with parents, siblings and extended family, relocating children to new suburbs, schools and towns — need to be made in the bright light of facts and a process that allows for the rule of law to be relied on. Allegations need to be proved to be true … [30]

The Children's Court of Victoria concurred:

> Courts are valued in a democratic community as the third arm of government. Courts are independent of the executive and the legislature and offer open and accountable decision-making in a society governed by the rule of law. A court guarantees all parties the right to be heard and is not subject to the influence of any party no matter how powerful.[31]

As Gorman observed:

> When the jurisdiction of a court is invoked, and the court becomes the instrument of a constraint upon power, the role of the court will often be resented by those whose power is curbed. This is why judges must be, and must be seen to be, independent of people and institutions whose power may be challenged before them.[32]

Justice Fogarty has argued that one reason for the existence of the Children's Court is that:

> it stands independent of the Department [of Human Services], the children and the parents and represents the community in the determination of these extremely difficult and delicate issues which are likely to have a profound, perhaps permanent, effect on the lives of the young children involved.[33]

These commentators stress that it is necessary for the Court to be independent and to be seen to be independent, especially from the DHS, which is the party in every proceeding before it. It must have the confidence both of the parents who come before it and the confidence of the community that it will act in an independent way in accordance with both the legislation and the constitutive principles of justice.

A similar case is made by Boreham for the use of legal representation. She argued that there is a case for clients in the Children's Court to have legal representation because this ensures 'families are not unreasonably interfered with':

> Parents of children who are subject to investigation by the DHS are often not given the benefit of the doubt; it is assumed that the very fact that investigation or court action has been initiated means the parents are in the wrong.[34]

We need a system that takes seriously the protection of the human rights of all parties. This is important granted that not all players in the current Victorian child protection system do so. In effect some actors in the child protection system are using the 'best interests' principle to trump the idea of human rights which is not something that is immediately or intuitively warranted. As one submission to the *Protecting Victoria's Vulnerable Children Inquiry* by a coalition of community service organisations put it, 'The common law of Australia is now sufficiently advanced to ensure that the rights of all are more than adequately protected by the adoptions of administrative processes to determine what is best for the child.'[35]

Likewise, Anglicare Victoria's McDonald argued against making the rights of individuals central to complex child protection cases, 'What we are looking for in complex circumstances is that for a child's welfare to be at the heart of it, not just running the rights of all the different stakeholders …'[36] The Child Safety Commissioner similarly was critical of the way the 'rights of parents' overshadowed 'issues to do with child development' in Children's Court proceedings.[37] What McDonald and the Victorian Child Safety Commissioner, Bernie Geary, are suggesting is that the human rights of all involved in complex child protection proceedings should be both restricted and superseded by focusing on the welfare of the child.

There are several relevant considerations here. Boreham argued that in the Children's Court, lawyers represent parents who are 'marginalised and disadvantaged … facing incredible barriers to realising their basic legal rights and protections.'[38] She added that,

‘’in the vast majority of child protection matters, [parents] have no effective voice in the cases that are heard at the Children’s Court where the future of their children, their families, is decided.’

McGregor also noted, ‘Our client base as a group of people are intergenerationally welfare dependent … if they didn’t have legal representation and a court that would listen to them, they would be totally at the mercy of departmental decisions.’[39]

If we are to take human rights seriously, Victoria needs a Children’s Court.

Diminishing the capacity of the Court without significant changes to other parts of the child protection system would constitute a serious breach of Australia’s obligations under the UN Convention on the Rights of the Child. Human rights are a moral code embodied in local and international law, which Australia, as a signatory to UN Conventions, is obliged to uphold. Victoria has, courtesy of its *Charter of Human Rights and Responsibilities 2006* (‘the Charter’) insisted as a principle at least that law, policy and practices that do not align with human rights contravene what is widely recognised morally as the right and just thing to do as well as the rule of law. The Children’s Court website has acknowledged the force of this consideration when it notes that:

> The court must observe the rules of natural justice and act compatibly with the human rights of children, parents and potentially others to a fair hearing under s.24(1) of the Charter of Human Rights and Responsibilities Act 2006.[40]

Similarly the Victorian Equal Opportunity and Human Rights Commission (‘VEOHRC’) argued in their submission to the 2011 Protecting Victoria’s Vulnerable Children Inquiry that:

> The Charter has relevance to all aspects of child protection, especially: … child protection legal proceedings. … Relevant Charter rights include … Privacy and reputation, including protection from arbitrary interference with family life. This right is engaged when a child is removed from the family. In these circumstances, the interference must be lawful and reasonable in the particular circumstances. … Fair hearing. The Charter provides a right to a fair hearing in criminal and civil proceedings. This extends to children’s interactions with the Children’s Court on child protection matters.[41]

With reference to international obligations, VEOHRC argued the Convention on the Rights of the Child, ‘includes specific rights around removal from family…’[42]

The FCLC identified the relevant international human rights treaties and sections of the Charter for child protection and argued that: ‘It is critical that Victoria’s child protection system is consistent with the rights protected in the Charter … and other relevant human rights in international treaties’.[43] For example:

> The right to a fair hearing in section 24 of the Charter is also particularly relevant to proceedings relating to the care and protection of children. The right to a fair hearing is an essential aspect of the judicial process and is indispensable to ensure the protection of other human rights.[44]

Additionally, VEOHRC’s submission to the Inquiry observed:

> that the Munro Review found that a learning rather than a compliance culture is needed to progress the best interests of children and maximise the best outcomes for the system as a whole.[45]

Munro, who headed a 2010 independent review of child protection in England, argued:

> A good child protection system should be concerned with a child’s journey through the system from needing to receiving help, keeping a clear focus on children’s best interest throughout. This includes developing the expertise and the organisational environment that helps professionals working with children, young people and families to provide more effective help.[46]

It is important to note that the Cummins Inquiry of 2012 agreed that retaining the Children’s Court would ensure that due consideration would be given to the ‘constitutional complexities, common law principles and the nature of the rights of the parties involved’.[47]

Conclusion

One way to approach the question of the Children’s Court and its role in child protection — where clearly so much is at stake for the children and families caught up in the system — is to simply ask: if you were in a similar situation where the things you cared about deeply, namely your well-being and family, your immediate life and future were at stake, then what would you want? Would you want recourse to the legal system and legal representation? We expect the answer in most cases would be a resounding yes. If this is so, then children and young people are no less entitled to the same legal protections as most adults would seek for themselves. The Children’s Court plays a critical role in child protection. Children, especially those who find themselves in the child protection system, are entitled to have their rights protected and their concerns addressed by those who understand and promote the principles of natural justice, the rule of law and the kind of accountability so vital to our court system. The Children’s Court is such an institution.

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REFERENCES

1. Children’s Court of Victoria comprises the Family and Criminal Divisions. Our reference here is to the Children’s Court – Family Division – and its hearing of applications relating to the care and protection of children and young people. Inquiries included: George Brouwer, *Own motion investigation into the Department of Human Services, Child Protection Program*, (Ombudsman Victoria, 2009); *Protecting Victoria’s Vulnerable Children Inquiry: Terms Of Reference* (7 March 2012) Child Protection Inquiry <http://www.childprotectioninquiry.vic.gov.au/terms-of-reference.html>; Victorian Law Reform Commission, *Review of Victoria’s child protection legislative arrangements: Terms of reference*, (31 October 2012) <http://www.lawreform.vic.gov.au/projects/child-protection/child-protection-terms-reference>.

2. VLA, *Submission to the Protecting Victoria’s Vulnerable Children Inquiry* (VLA, 26 July 2011); Bevan Warner, *Supplementary submission*, (2011); LIV, *Submission to Protecting Victoria’s Vulnerable Children Inquiry* (2011); FCLC, *Submission: Protecting Victoria’s Vulnerable Children Inquiry*, (2011).

3. Brouwer, above n 1, 50, 57, 58, 66.

4. Anglicare, Berry Street, MacKillop Family Services, The Salvation Army, Victorian Aboriginal Child Care Agency and Centre for Excellence, May 2011, *A better approach to protection and care: A submission to the Protecting Victoria’s Vulnerable Children Inquiry, Child Protection Inquiry*,

<http://www.childprotectioninquiry.vic.gov.au/images/stories/submissions/anglicare-victoria-et-al.pdf>; Paul McDonald, 'Children lost in a chaotic court system', *The Age* (Melbourne), 11 October 2010.

5. Office Child Safety Commissioner ('OCSC'), 2011, *Submission by the OCSC to the Protecting Victoria's Vulnerable Children Inquiry*; Carly Crawford, 'Push to abolish Children's Court in Victoria under welfare shake-up', *Herald-Sun* (Melbourne), 13 September 2011; Carol Nader, 'Call to make child protection less hostile', *The Age* (Melbourne), 6 October 2010.

6. Philip Cummins, Dorothy Scott & Bill Scales, 2012, *Report of the Protecting Victoria's Vulnerable Children Inquiry*.

7. Victorian Government, *Directions Paper Victoria's Vulnerable Children: Our Shared Responsibility,* (2012), in particular see 18–22.

8. See Cummins, above n 6, for evidence about the clash of cultures, 386.

9. Anglicare et al, above n 4, 52.

10. Brouwer, above n 1, 47.

11. Ibid.

12. McDonald, above n 4.

13. Ibid.

14. Anglicare et al, above n 4, 53.

15. Children's Court of Victoria, 2011a, *Submission to the Protecting Victoria's Vulnerable Children Inquiry*, 15.

16. Children's Court of Victoria, 2011b, *Supplementary submission to the Protecting Victoria's Vulnerable Children Inquiry*, 28–29.

17. Paul Grant, 'Safeguarding children must concern us all', *The Age*, 22 December 2009, 11.

18. VLA, above n 2, 20, see also, Children's Court of Victoria, above n 15, 17–19.

19. Rebecca Boreham, 'The chance to be heard', *The Age* (Melbourne), 21 December 2009, 17.

20. Anglicare et al, above n 4, 52–55.

21. Alasdair MacIntyre, *After Virtue: A study in moral theory* (University of Notre Dame Press, 2nd ed, 1984), 8.

22. Murray Gleeson, *The rule of law and the Constitution: Boyer Lectures* (ABC Books, 2000) 1–2.

23. Boreham, above n 19.

24. Joe Gorman, Case's publicity shows why DHS should answer to court, *The Age* (Melbourne), 15 December 2009, 15.

25. Farah Farouque, 'Kids in court', *The Age* (Melbourne) 24 January 2012; see also Children's Court of Victoria. *Research Materials: Family Division – General*, Children's Court of Victoria (20 September 2012), <http://www.childrenscourt.vic.gov.au/CA256CA800011129/page/Research+Materials?OpenDocument&1=60-Research+Materials~&2=~&3=~>.

26. FCLC, above n 2, 8.

27. Victorian Law Reform Commission, above n 1, 8–9.

28. Warner, above n 2.

29. Gorman, above n 24.

30. Boreham, above n 19.

31. Children's Court of Victoria, 2011c, above n 25, 7.

32. Gleeson, above n 22.

33. Justice John Fogarty, *Protective services for children in Victoria: A report* (Health & Community Services, 1993) 142–243.

34. Boreham, above n 19.

35. Anglicare et al, above n 4, 54.

36. Farouque, above n 25.

37. Ibid.

38. Boreham, above n 19.

39. Farouque, above n 25.

40. Children's Court of Victoria, 2011c, above n 25.

41. VEOHRC, *Submission to the 2011 Protecting Victoria's Vulnerable Children* (April 2011), 8–10.

42. Ibid 11.

43. FCLC, above n 2, 6.

44. Ibid 7.

45. VEOHRC, above n 41, 38.

46. Eileen Munro, *The Munro Review of Child Protection – Part One: A systems analysis* (2010), 12, <http://www.education.gov.uk/munroreview/downloads/TheMunroReviewofChildProtection-Part%20one.pdf>.

47. Cummins et al, above n 6, 381.